IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 26TH OCTOBER, 2007/4TH KARTHIKA, 1929

CMA.No. 256 of 2001()

AS.15/1995 of III ADDL. DISTRICT COURT, KOLLAM
OS.482/1981 of PRL.M.C., KOLLAM

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APPELLANTS - RESPONDENTS & DEFENDANTS:

1. K.G. CHANDRADASAN, ATTOR PADINJATTATHIL ASRAMATHU CHERY, KOLLAM.

2. K.G. VAMADEVAN, DO. DO.

3. JAGATHAMMA, AJAYA BHAVAN, ASRAMAM CHERY, KOLLAM.

4. BHUVANENDRA BABU, DO. DO.

5. SURESH BABU, DO. DO.

6. GIR GOSH, DO. DO.

7. AJAYA GOSH, DO. DO.

BY ADV. SRI.B.S.SWATHY KUMAR
SRI.K.HARILAL

RESPONDENTS - APPELLANTS - PLAINTIFFS - DEFENDANT:

1. NEELAKANTAN JANARDHANAN, KANJIYIL VEEDU, ASRAMATHU CHERRY, KOLLAM VILLAGE (DIED).

2. S. RAMABHADRAN, UPPUPADANNAYIL VEEDU, KIDAPRAM MURI, MANDROTHURUTHU VILLAGE.

3. BALA SARASWATHY, KANJIYIL VEETTIL, ASRAMATHU CHERRY, KOLLAM VILLAGE.

4. THANKAPPAN, THODIYIL KIZHAKKATHIL, ULIYACOVIL VEETTIL, ASRAMATHU CHERRY, KOLLAM VILLAGE.

5. PRABHAVATHY, THODIYIL KIZHAKKATHIL, ULIYACHIL CHERRY, KOLLAM VILLAGE.

6. JANAKI KAMALAM, KUZHIKALA VILA VEEDU,
THRIKKOVILVATTOM VILLAGE.

ADDITIIONAL RESPONDENTS IMPLEADED
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7. SUBHADRA, W/O. LATE NEELAKANTAN JANARDHANAN,
KANJIYIL VEEDU, ASRAMATHU CHERRY P.O.,
KOLLAM VILLAGE (EAST).

8. BALASARASWATHY, D/O. LATE NEELAKANTAN
JANARDHANAN, DO. DO.

9. JAYA, D/O. LATE NEELAKANTAN JANARDHANAN, DO. DO.

10. UDAYABHANU, S/O. LATE NEELAKANTAN
JANARDHANAN, DO. DO.

11. JAYANTHI, D/O. NEELAKANTAN JANARDHANAN, DO. DO.

ADDITIONAL RESPONDENTS 7 TO 11 ARE IMPLEADED
AS LEGAL HEIRS OF DECEASED FIRST RESPONDENTS
VIDE ORDER DATED 22.11.2006 ON CMP NO.813/2002.

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 26.10.2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 256 OF 2001

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Dated this the 26th day of October, 2007

J U D G M E N T

Defendants 1 to 7 in O.S. No.482 of 1981 on the file of the Munsiff's Court, Kollam, who are the respondents in A.S. No.15 of 1995 on the file of the Third Additional District Court, Kollam, are the appellants. Appeal is filed against the order of remand passed by the lower appellate court by which it set aside the decree and judgment passed by the trial court dismissing the suit and remanded the case for fresh disposal with certain directions.

2. Initially the first plaintiff alone filed the suit on the following averments. Suit property was purchased by him under two sale deeds. One cent of property situated on the north-eastern side was given as kudikidappu and he was in possession of the remaining property. Defendants are owners of the property lying on the western side of the property owned by the plaintiff. There was no clear cut boundary to separate the property of the plaintiff from that of the defendants. Taking advantage of that fact, defendants

trespassed into suit property and reduced about six cents of land to their possession. So the suit for recovery of possession and putting up boundaries. Plaintiff also sought for a decree of prohibitory injunction restraining the defendants from committing further trespass.

3. Defendants 1 to 3 filed a joint written statement contending that the suit was not maintainable. It was contended that plaintiff was not entitled to any relief sought for in the plaint. According to defendants 25 cents of land comprised in Sy.No.9768 was purchased by their father in the year 1116 M.E. from one Kunchali Kali. While their father was enjoying the property, he died and his children entered into a partition. It was contended that there was clear cut boundaries to separate plaintiff's property from that of the defendants from the year 1116 M.E. onwards. The averment that defendants trespassed into the suit property and reduced six cents of land to their custody was denied. The prayer for recovery was denied. It was contended that there was no need to put up any new boundary. It was also contended that even if the plaintiff had any right over the property, the same was lost by adverse possession and limitation. Subsequently,

plaintiffs 2 to 5 were impleaded. Second defendant died and additional defendants 4 to 9 were subsequently impleaded. They did not file any written statement. Four Advocate Commissioners were deputed and Exhibits C1 to C8(a) are the plans, reports, etc., filed by them.

4. Trial court held that the evidence tendered by the plaintiffs shows that there was boundary to separate plaintiffs' property from that of the defendants. Trial court also noted that though in the plaint first plaintiff claimed title over 40 cents, his oral evidence shows that he sold portions of the suit property to strangers and admitted that those properties are in the possession of strangers. The trial court dismissed the suit. Challenging the decree and judgment passed by the trial court, plaintiffs filed A.S. No.15 of 1995. The lower appellate court set aside the decree and judgment passed by the trial court dismissing the suit and remanded the case to the trial court for fresh disposal. Challenging the order of remand, defendants 1 to 7 had filed this appeal.

5. At the time of admission, no substantial question of law was framed in the appeal. At the time of hearing the following substantial questions of law were framed:

(a) Whether the order of remand passed by the lower appellate court for enabling the plaintiffs to adduce fresh evidence so as to fill up the lacuna in the evidence is legal and proper?

(b) Is it proper for the lower appellate court to set the Commissioner reports directing the defendants to take out a fresh commission to fix the boundary of the plaintiffs' property on the ground that there was some delay in filing objection to the Commission reports?

6. Learned counsel appearing for the appellants has argued that there is unequivocal admission by the plaintiffs that there is a well defined and clear cut boundary separating their property from that of the defendants. It is argued that before the trial court first plaintiff had admitted that there is a fence and that fence was there for the last so many years. It is also argued that it was admitted that the property on the west of fence alone was in the possession of the predecessor-in-interest of the plaintiffs.

7. In paragraph 8 of the trial court judgment there was admission made by the plaintiffs to the effect that boundary is in existence to separate between plaintiffs' and defendants' properties. Trial court also noted the fact that plaintiffs had

no case that there was any trespass and the defendants had reduced any portion of the suit property into their possession. Trial court had also noted that the plaintiffs had admitted that in addition to the one cent given for kudikidappu, first plaintiff sold 7.5 cents of land to one Smt.Savitrhi and again another 4 cents of land to Smt.Savithri. It was also noted that first plaintiff sold 5¼ cents of land to one Balakrishna Pillai. Those properties are separated by compound walls and plaintiffs claimed only 22 cents. Thereafter again, first plaintiff sold 4 cents of land to one Thankappan and another 15 cents was gifted to plaintiffs 2 and 3 as per Exhibit A16. Trial court further took note of the fact that first plaintiff had stated in the plaint that he is possession of a compact plot of 40 cents. Trial court found that the plaintiffs are not entitled to the reliefs sought for in the plaint and dismissed the suit.

8. The lower appellate court did not consider the oral evidence adduced in this case at all. It took a view that the learned Munsiff has not given any proper reasoning while discarding the evidence and dismissing the suit. Lower appellate court held that defendants filed objection to the commission report and plan after the expiry of 17 months

after the filing of the report. Lower appellate also took note of the fact that plaintiffs had not stated about the assignments but held that that will not establish any mala fide intention. The question to be considered is not whether there was any mala fide intention but whether it is possible to grant any relief to the plaintiffs in the suit.

9. In paragraph 13 of the judgment lower appellate court held as follows:

> "Since there is not any favourable submission from the side o the respondents I find that it is justifiable to remand the matter to the trial court with a direction to dispose of the objection petition I.A. 4998/94 filed by the respondents/defendants. If it is necessary to depute the same commissioner and Taluk Surveyor the entire costs shall be met by the respondents since they have filed the objection petition at a belated time. Point is answered accordingly".

10. The mere fact that there was no favourable submission from a party is not a ground to set aside a decree and judgment and remand the case. Lower appellate court should have considered the entire evidence, oral and documentary, and considered whether the findings recorded by the trial court were correct or not. Lower appellate court

also went wrong in directing the appellants to take out a commission to fix the boundary separating their property from that of the plaintiffs on a simple ground that there was delay in filing objection. The reasoning are illegal. So the order of remand passed by the lower appellate court is illegal and liable to be set aside. I am of the view that the lower appellate court itself shall consider the matter on merits and dispose of the same in accordance with law.

11. In the result, the appeal is allowed. The judgment dated 16.8.2001 passed by the Third Additional District Judge, Kollam, remanding the suit is hereby set aside. The appeal is remanded. Learned Judge is directed to take A.S. No.15 of 1995 back to file and dispose of the same afresh in accordance with law.

12. Parties shall appear before the lower appellate court on 5.12.2007.

Civil Miscellaneous Petition Nos.4265 of 2001 and 731 of 2002 shall stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 256 OF 2001

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J U D G M E N T

26TH OCTOBER, 2007

K. PADMANABHAN NAIR, J.

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J U D G M E N T

TH OCTOBER, 2007

Neither counsel nor appellants present when the case was taken up. In the result, appeal is dismissed for default.

Civil Miscellaneous Petition No.4265 of 2001 and 731 of 2002 shall stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv